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CHILTON RANCH & CATTLE COMPANY
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James L. Connaughton, Chairman
Council on Environmental Quality
NEPA Task Force
P.O. Box 221150
Salt Lake City, UT 84122

September 18, 2002

Regarding: Comments on current NEPA implementing practices and procedures (67 FR 45510-45512)

Dear Mr. Connaughton:

These comments detail chronologically how the federal bureaucracy tried to impose its will through the National Environmental Policy Act ("NEPA") process to achieve ends never envisioned by the passage of seemingly progressive NEPA legislation. Using the NEPA process, agenda-driven bureaucrats and radical activists have imposed grave time, emotional and financial burdens on us without any commensurate legal or financial exposure to themselves. In fact, the following comments illustrate how a few radical bureaucrats can abuse their power and wreak havoc on private citizens by using the NEPA process in conjunction with the Endangered Species Act.

During the early 1990's some Justice Department and federal agency bureaucrats created a very useful political hammer: a determination that NEPA analyses would no longer be confined to "major federal actions" but would be required for each and every 10-year permit renewal on every historic federal grazing allotment in the county. Activists in the federal bureaucracy in three specific agencies, the U.S. Forest Service, the Bureau of Land Management, and especially the Fish and Wildlife Service, ratcheted up their campaign to end the harvest of renewable and sustainable forage by tying up grazing permit renewal activities in the NEPA process carried to its illogical extreme.

Background Information

In 1996 the Forest Service began the NEPA process to examine and possibly amend the Chiltons' Allotment Management Plan on the 21,000-acre Montana allotment located south of Arivaca, Arizona and adjacent to the U.S.-Mexico border.

Cattle have grazed the Montana allotment for approximately 300 years beginning with Spanish ranchers headquartered in both the communities of Arivaca, Arizona and Saric, Mexico. The Chiltons' ranching activities are a direct continuation of this long-standing historic land use. Thirty years of data in the Coronado National Forest files, detailed production and utilization studies by nationally recognized range management scientists (Dr. Jerry Holechek and Dr. Dee Galt), and reports by numerous other

researchers show that the Chilton range resources are currently in good condition, are improving and have an exceptional number of high value native climax species. On August 25, 1998 widely published range management text book author, Jerry L. Holechek, Ph.D., Professor, Range Science, New Mexico State University and Dee Galt, Ph.D., range and soils expert stated that "It is our strong opinion that the Montana Allotment is one or our greatest success stories in modern range management. This applies to both upland and riparian portions of the allotment."

In 1995, a small, prolific minnow, the Sonora chub, was found in ephemeral waters in a tiny, quarter-mile reach of California Dry Gulch immediately adjoining the Mexican border. The minnow is safe, secure and abundant in its habitat in Mexico according to the leading specialist on this desert fish (Dean Henderson) but is only found in the United States in one perennial water on a neighboring ranch east of the Chiltons and, since 1995, occasionally in pools in California Dry Gulch on the Montana Allotment. The *Southwestern Naturalist*, June 1990, describes the Sonora chub (Gila ditaenia) as abundant in Mexico where the chub dominates its 5,000 square mile watershed and constitutes 99.7% of the total number of fish and 96.9% of the biomass. Nancy Kaufman, former Regional Director, FWS, Albuquerque, justified listing this species, and others whose range barely extends across the Mexican border, by stating that, if a species is small in number in the U.S., citizens should not have to travel abroad to see it regardless of its abundance in its native habitat across an international border;

Chronology of Major Events

The following is a chronology of only the major events and a delineation of regulatory abuses by some Forest Service employees, often in collaboration with Fish and Wildlife Service (FWS) bureaucrats and activists at the Tucson-based Center for Biological Diversity.

1. The NEPA analysis for the Allotment Management Plan for the Montana Allotment was initiated on October 1, 1996 even though the 10-year grazing permit renewal was not due until February 2003. When Jim Chilton asked why, he was told by a retired Forest Service official that it was a tactic created by Randall Smith in the Tucson office to "stir the pot and let activists within the government and outside the government take a shot at you";
2. During 1997, the Forest Service "removed" 20 acres from the Montana allotment along California Dry Gulch adjoining the border to "protect" the Sonora chub without going through the NEPA process. The excluded area had lush riparian growth and had been part of a successful experiment-in-progress to demonstrate that rest-rotation grazing could enhance riparian condition. The Forest Service has refused to pay just compensation for the taking of the Chiltons' water rights and forage rights within the 20-acre fenced-off area;
3. Center for Biological Diversity and the Forest Guardians (vociferously anti-grazing litigious groups) filed a lawsuit in 1997 demanding that the Forest Service remove livestock from about 140 Forest Service grazing allotments in Arizona and New Mexico, including the Montana Allotment. The Chiltons spent about $30,000 trying to

intervene in the case without success. Fortunately, the Arizona Cattle Growers' Association and New Mexico Cattle Growers' Association were allowed to intervene and represent the Chiltons' interests and those of other affected Association members. The Forest Service, without agreement or consultation with either of the Cattle Growers' associations, settled the case during secret negotiations with the radical environmentalists during the trial. The settlement seriously adversely impacted ranch allotment owners. Judge Roll, the presiding judge, however, concluded that, since the settlement was strictly between the Forest Service and the environmentalists, he would not allow the two-party agreement to be enforced by the Federal Court;

4. In 1998, Chilton, under the Freedom of Information Act, requested his Forest Service official file. This led to the discovery that some Forest Service personnel in the Tucson office had been stuffing the official record with inaccurate information regarding soil conditions (estimates from the 70's that were never field-checked), claims of "effects" on endangered species never shown to be present, negative comments about "riparian conditions" on dry reaches of the Gulch and range condition reports not based on the substantial available scientific data on the Montana Allotment;

5. Chilton immediately retained range and soils experts, biologists, a lesser long-nosed bat expert and, eventually a hydrologist and riparian expert. Each expert was asked to carefully analyze the Montana Allotment using peer-reviewed scientific processes, to collect up-to-the-minute data and then to prepare reports to correct the false and outdated material in the Forest Service's official record;

6. In 1998, Jerome Stefferud, a Forest Service fisheries biologist, asserted that grazing was "likely to adversely affect" the Sonora chub. Stefferud's adverse call was based upon speculation, personal philosophy and wildly improbable assertions rather than the best scientific and commercial data as required under the Endangered Species Act. The adverse call was astonishing since all Sonora chub that swim north of the international border die when the subflow that rises to the surface in California Dry Gulch in rainy seasons quickly drops below the level that would support even a minnow;

7. Forest Service botanist Mima Falk concluded in 1998 that cattle grazing on the Montana Allotment was "likely to adversely affect" the lesser-long-nosed bat, a listed species, even though this species has never been found on the Montana Allotment. (The leading scholars of the lesser long-nosed bat, professors Yar Petryzyn and Lendell Cockrum, University of Arizona, have published a paper stating that the bat should never have been listed since it is safe and secure in its habitat in Mexico);

8. John McGee, Supervisor, Coronado National Forest Service signed a Biological Assessment for the Montana Allotment in November 1998, containing unsubstantiated speculation with no estimates of the related probabilities (how likely is it that "cattle will ingest" minnows?), gross misrepresentations (the Dry Gulch was consistently referred to as the "stream"), and generalizations based on research in dissimilar sites under different management, all cobbled together to make a thick, pseudo-scientific document asserting that grazing could harm the not-present-bat and the certain-to-die minnow;

9. The Forest Service and FWS refused to allow the Chiltons, legally recognized as having official applicant status in the process, to participate in any Forest Service and/or FWS discussions, meetings or deliberations prior to the issuance of the draft FWS Biological Opinion. Upon receipt of the FWS draft Biological Opinion, the Chiltons requested their lawyers, range, riparian, soils and fish experts to comment on it;

10. During April 1999, FWS issued a Final Biological Opinion which ignored all comments by the expert team and contained detailed and inflexible regulations specifying how Chilton must manage the Montana allotment for the purported benefit of two species that couldn't possibly avail themselves of the "protections." The nondiscretionary terms and conditions required extraordinary monitoring (far beyond the already extensive scientific monitoring then in place) and Forest Service enforcement of the land use regulations. The process substituted harassment for management and added an estimated $25,000 per year of expenses to the Chiltons management of the allotment;

11. In September 1999, the Forest Service issued an Environmental Assessment titled Montana Allotment Management Plan. Chilton eventually worked out an agreement that permitted him to support the preferred alternative recommended by the Forest Service Environmental Assessment. The plan allowed for Chilton's cattle to use 45% of the forage and leave 55% for wildlife and esthetics. This plan also replaced the fixed permit number of 500 cows with a "range" of 400 to 500 cows per year (to be subject to yearly determination) and decreased the market value of the allotment by approximately $150,000;

12. In December 2000, Arizona Cattle Growers' Association and Chilton won a major lawsuit against the FWS and Forest Service in Federal District Court. The Court decision voided portions of the Final Biological Opinion on the Montana Allotment. The Court found that the Biological Opinion was arbitrary, capricious and unlawful. In a major victory for the Chiltons and numerous other ranching families, the Court found that the Sonora chub was not present on the Allotment since the tiny reaches it occupied seasonally had been excluded from the Allotment, and that the lesser long-nosed bat had never been sighted on the Allotment. As a consequence, cattle grazing could not kill or injure either species. Therefore, the FWS could not issue an incidental take statement and impose draconian terms and conditions regulating Chiltons' grazing program;

13. IGNORING THE FEDERAL COURT DECISION and over the objections of Chilton's lawyers, Forest Service officials in Tucson decided, once again, to consult with the FWS on the Sonora chub and lesser long-nosed bat. Chilton's lawyers argued that consultation took place in early 1999 and the Federal District Court had already ruled on the prior consultation and biological opinion;

14. IGNORING THE FEDERAL COURT DECISION Jerome Stefferud, a Forest Service fisheries biologist, once again prepared a Biological Assessment concluding that cattle grazing was likely to adversely affect the Sonora chub. Once again, Stefferud failed to use the best scientific and commercial data to reach his conclusions. He filled the bibliography with anti-grazing, gray literature citations, junk science and science from cold-water fish species inappropriately applied to warm water minnows. He omitted recent research by Arizona warm water fish experts indicating the compatibility of grazing with maintenance of native warm water minnow populations;

15. IGNORING THE FEDERAL COURT DECISION, Forest Service biologist Tom Newman prepared another species effects assessment finding that cattle grazing would adversely affect the lesser long-nosed bat even though the species has never been seen on the Allotment (a dead bat was found in 1959, 10 miles east of the Allotment);

16. The FWS and the Forest Service, once again, refused to let Chilton and his experts participate in any discussions, meetings or communications during the

consultation process even though Chilton's lawyers asserted that Chilton had the right under the law and under FWS regulations to participate in the process;

17. In March 2001, FWS sent the new draft Biological Opinion to the Forest Service and Chilton. The draft Biological Opinion ignored the Forest Service preferred alternative worked out and agreed to by the Forest Service and Chilton. In fact the FWS demanded the elimination of grazing on 1,200 acres along California Dry Gulch to allegedly protect the Sonora chub. The authors of the draft Biological Opinion described California Gulch as a "stream," even though the Gulch is dry eight to ten months each year. In addition, preparation of the draft Biological Opinion appeared to have been guided by Jerry Stefferud's wife Sally, a fish biologist at the FWS;

18. In March 2001, Chilton responded to the draft Biological Opinion. A detailed and site-specific reply was prepared by representatives of three law firms, range and soils experts, Rocky Mountain Research Station fish and hydrology authorities, a fish biologist and range consultants. The Forest Service, also upset with the FWS's arbitrary removal of 1,200 acres of grazing and the rebuff of the Forest Service preferred alternative, prepared objections to the draft FWS Biological Opinion;

19. In April 2001, the Chiltons delivered the aforementioned comments to David Harlow, the Field Supervisor of the FWS in Phoenix, Arizona. The comments included extensive, dated photographic documentation that California Dry Gulch is dry most of each year, provided hydrological evidence that the watershed could never support a perennial stream with or without grazing, demonstrated that every fish that swims north of the international border dies regardless of the presence or absence of cattle, and established the fact that no one has ever identified a lesser long-nosed bat on the Montana Allotment. Harlow listened to the Chilton's comments and appeared surprised when the evidence clearly demonstrated that California Dry Gulch is an intermittent, ephemeral wash and not the perennial stream repeatedly referred to in the draft Biological Opinion. It appeared during the meeting that Harlow had been misled by the FWS fish biologist, Sally Stefferud, into believing that the Gulch was a stream and could support a native fishery;

20. In June 2001, after the Chiltons had spent hundreds of thousands of dollars, countless hours of work with top-ranking consultants, days and weeks of lost time in meetings and legal wrangling, and a final month assembling an incontrovertible mountain of scientific evidence, David Harlow ultimately reversed the conclusions of the draft Biological Opinion and approved a final Biological Opinion supporting the Forest Service's Preferred Alternative. This final Biological Opinion removed the requirement that grazing be eliminated on the 1,200 acres along the banks of California Dry Gulch;

21. The Forest Service finalized the "Decision Notice Finding of No Significant Impact" NEPA document on September 20, 2001. Mysteriously, the Nogales office of the Forest Service did not publish the Record of Decision as required;

22. After the standard 45-day publication period, the Forest Service advised the Chiltons that the Record of Decision had not been published and the Forest Service had decided to withdraw the Record of Decision;

23. During November 2001, the Forest Service decided to conduct additional analysis on indicator species prior to publishing a new Record of Decision;

24. On December 17, 2001 the U. S. Ninth Circuit Court of Appeals ruled in ARIZONA CATTLE GROWERS' ASSOCIATION, JEFF MENGES v. UNITED

STATES FISH AND WILDLIFE, BUREAU OF LAND MANAGEMENT and the SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY that the Biological Opinion on the Chilton's Montana Allotment was arbitrary, capricious and unlawful, upholding and *extending* a lower court decision that had been appealed by the FWS and the Center for Biodiversity;

25. On April 23, 2002 the Forest Service published a new Record of Decision titled "Decision Notice Finding of No Significant Impact." The Center for Biological Diversity (Tucson), The Forest Guardians (Santa Fe) and a Phoenix anti-grazing activist separately appealed the Record of Decision;

26. On June 15, 2002 the Chilton's appealed the Record of Decision: requesting that (1) modern range technology published in peer reviewed scientific journals be used to determine grazing use in each pasture rather than an arbitrary system established in the Record of Decision; (2) the Chiltons should not be cited by the Forest Service if cattle escape one pasture into another when the fence has been cut by druggers moving drugs from Mexico through the grazing allotment, or when hunters, birders, hikers and other recreationists leave gates open; and (3) the renewed permit should be for a fixed number of cattle, not a range of 400 to 500 head of cattle;

27. On June 17, 2002 the Forest Service rejected all appeals and the NEPA process was concluded.

The NEPA process to renew a 10-year grazing permit has taken about six years. Furthermore, the NEPA process empowers some activists in the bureaucracy to "push the envelope" of the law. Poof of arbitrary, capricious and unlawful activists' behavior within the bureaucracy against the Chiltons was found by both U.S. District Court Judge Broomfield and the U.S. Court of Appeals, Ninth Circuit. Please refer to ARIZONA CATTLE GROWERS' ASSOCIATION, JEFF MENGES, Plaintiffs-Appellees-Cross Appellants, v. UNITED STATES FISH AND WILDLIFE, BUREAU OF LAND MANAGEMENT, Defendants-Appellants-Cross-Appellees, and the Southwest Center for Biological Diversity, defendant-Intervenor-Appellant, Nos. 99-16102, 00-15511, 99-16103, 00-15322, for the Montana Allotment portion of the decision.

Grazing on the Montana Allotment has existed for approximately 300 years and is a continuation of a long-standing historic land use. Federal law requires the Forest Service to prepare plans "in consultation with the permittee(s)" and analyze each allotment "with careful and considered consultation and cooperation with the affected permittees" (43 U.S.C. S. 1752). There are many outstanding and competent people within the Forest Service who can and have worked with permittees to manage the land in the spirit of (43 U.S.C.S. 1752). Prior to the 1990's, permit renewals were made without the unbelievable cost in time and money required by the NEPA process. The overwhelming backlog has resulted in the "analysis paralysis" DESIRED by grazing opponents because it gives them an open door to request a cheap injunction against grazing **without any need for proving any harm to any species.**

The public burden created by the present interpretation of NEPA can be graphically understood just by calculating the paper involved. There are approximately 30,000 Federal grazing allotments. If each official record created during the NEPA process for

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each Federal grazing allotment is only 6 inches thick, eliminating the NEPA process requirement for each grazing permit renewal would eliminate approximately 15,000 feet (about three miles) of official records every ten years. Additionally, the lessened paperwork burden would permit Forest Service range officers to do the constructive work they were intended to do in the field rather than spend the vast majority of their time on the "paper process."

In our case, none of the years of abuses, adverse calls, biological assessments, biological opinions, court cases, costs, red tape, anger and bitterness would have taken place if the NEPA process were not imposed on simple renewals of the unchanged historic use on each individual ranch. The NEPA process should be limited to the Forest Plan (a major federal action). At the very least, the Forest Service should declare that a categorical exclusion is justified for renewals of long-standing allotment leases.

Respectfully,

Jim Chilton Sue Chilton

Jim and Sue Chilton

Arizona Congressional Delegation
Doc Lane, Arizona Cattle Growers' Association
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